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THE STOCK EXCHANGE "A SHAM MARKET"?

OR

THE RECENT

STOCK EXCHANGE CASES

OF

GRISSELL *v.* BRISTOWE,

AND

COLES *v.* BRISTOWE,

AS DECIDED ON APPEAL, STATED BY

The Economist

TO BE

UNREASONABLE AND INEQUITABLE,

AND MAKING A SHAM MARKET.

CONSIDERED BY

JAMES J. ASTON, Esq.,

OF THE MIDDLE TEMPLE, Q.C. OF THE COUNTY PALATINE OF LANCASTER.

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THE RECENT

STOCK EXCHANGE CASES,

&c., &c.

THAT the recent Stock Exchange decisions on Appeal in the cases of Grissell *v.* Bristowe, 38 Law Journal, Com. Pleas 10, and Coles *v.* Bristowe, 4 Law Reports, Ch. Appeal 3, are not *reasonable or equitable, and make a sham market*, has been boldly stated by the *Economist* in a leading article which appeared in that paper on the 12th December last (reprinted by permission in the Appendix hereto).

Such an allegation requires careful consideration, as the regulations and usages involved in these cases are of general application to all similar contracts upon the Stock Exchange. And this careful consideration is not rendered the less necessary by the fact that one Court of Appeal professes itself ready to adopt a reason for its judgment which is utterly rejected by the other Court of Appeal.

Upon carefully considering these cases, the author of the following observations has come to the conclusion that many and good reasons may be urged for

questioning the decisions in these cases; they are so well known that they may be at once discussed.

First, then, as to the case of Grissell *v.* Bristowe, as decided by the Court of Exchequer Chamber. The great *fallacy* of this case, it is respectfully submitted, is that it treats the contract made by Grissell with Bristowe as capable, according to the facts, of being transferred from Bristowe to a name or names given by Bristowe to Grissell as the transferrees of the shares.

That this fallacy is the key to the decision which is said to be unreasonable and inequitable, would seem to be clear,—1st. From the erroneous statement of the practice of the Stock Exchange, it is said by the Court to be as follows:—"It is the practice of the Stock Exchange for jobbers, on the re-sale of stock or shares bought by them, to give the name of the party from whom, *together with the price at which, they have bought*, to the broker of the parties buying from them, on a ticket used for that purpose." This statement is clearly erroneous in this, that the jobbers do not give the price at which *they* have bought to the *brokers* to whom they sell; the only price in the name ticket is the price at which the purchaser bought them, into whose name they are to be transferred, and this passes from hand to hand through the intermediate dealers as a direction for the transfer, and as a draft for so much money, and is very seldom, if ever, the price paid to the vendor, who is also the transferror of the shares.

And the same fallacy as to the possibility of the transfer of the contract is repeated when the Court sums up the evidence as to the usage. The Court says that "the sum and substance of the usage as we collect it, after a careful consideration of the statements in the case, may be thus stated:—It appears that in transactions between members of the Stock Exchange, there is an implied understanding that, on the purchase of stock, the jobber shall be at liberty by a given day, commonly called the name day, to substitute, if he be able to do so, another party or parties as buyers, and so relieve himself from further *liability in the contract*, provided that such party or parties be persons to whom the seller cannot reasonably except, and that such party or parties accept the transfer of the shares, *and pay the price agreed upon between the seller and the jobber*—in other words, become the buyer of the shares, and *pay the price agreed on between the seller and the jobber.*" This, the Court says, appears to be the true statement of the usage; but as the facts are, and as is well known to everybody on the Stock Exchange, this summary is not a true statement of the usage. The nominee of the jobber never undertakes to pay other than his (the nominee's) own purchasing-price, and never agrees to become the buyer of the shares and pay the price agreed on between the seller (the transferror) and the jobber—in other words, never agrees to take upon himself any other contract than his own, which is at a price almost invariably different to the price

received by the seller who transfers the shares. The price named in the transfer may be more, much more, than the seller has a right to retain to himself, in which case he accounts with his vendee for the *excess* received. It seems impossible reasonably, according to either Law or Equity, to hold that an admitted contract by Grissell with Bristowe, to transfer a certain number of shares at a given price, can be transferred by any usage into another contract by Grissell with Bristowe's nominee to transfer the same number of shares at another price to such nominee.

The price named in the transfer is not, according to the practice, treated as, nor is it in fact, the price at which Bristowe bought of Grissell. The price may not be even the price at which Bristowe sold, as his sale may not have been to the nominee, but to some other person whose nominee the transferree is.

Before leaving this point it may be as well to refer to the Stamp Act, as to stating the consideration paid by the last sub-purchaser. One of the provisions of the 55 George 3, c. 184, is to the effect, "That where any person, *having contracted for the purchase* of any lands or other property, but not having obtained a conveyance thereof, *shall contract to sell* to any other person, and the same shall in consequence be conveyed immediately to the sub-purchaser, the principal or only deed or instrument of conveyance shall be charged with the said *ad valorem* duty in respect of the purchase or consideration money therein mentioned to be paid, or agreed to be paid, by the sub-purchaser."

The statement of this last price on the contract of transfer as if it were the price actually paid by the transferree to the transferror, would seem to have been the cause of all the difficulties in these cases, and is perhaps the only erroneous point of Stock Exchange practice: it states what in effect is a *false statement*, and a *false statement under seal* on the face of the transfer as in effect, though the money may actually be paid by the transferree's broker to the transferror's broker, it is not paid to the transferror, and but only his own sale price is ever received by him. The practice is provided for by Rule 89 of the Stock Exchange Committee, which provides that "the seller of shares or stock shall cause the same to be transferred at the price marked upon the ticket given him by the buyer," with a provision requiring such price to be a price during the account or two preceding accounts. This rule requires amendment: it is a source of great uneasiness and perplexity to many persons not familiar with Stock Exchange practice, and sometimes such persons think that their brokers have cheated them when they are made to execute a deed stating that they have received more money than they have received. It would be easy enough to state the facts as they are, without making a *false statement on the deed.* For instance, the transfer might run thus:—"I, , in consideration of the sum of £ , paid by , according to the usages of the Stock Exchange, as the sub-purchaser of the shares hereinafter mentioned (my purchase-money as

vendor of the said shares having been duly paid according to such usages), do hereby bargain, &c." If the facts were thus stated, would it not throw light upon the whole difficulty as to the usages? The consideration might then be read according to the facts thus—that the number of shares were from each sale held as between each vendor and vendee, for better for worse, at the risk of each vendee, at the price agreed on between them, and so on, through as many parties as there were vendors and vendees, and each vendor looking to his vendee, and *vice versâ*.

That the original contracts were as above suggested there seems to be no question, and the difficulty has been entirely caused by supposing that the usages as to the mode of carrying out such contracts have in some way altered the contracts by the exercise of some judgment in the transferror or his broker as to whether the proposed transferree is reasonably objectionable or not, and by supposing that the transferror has under such usages elected to give up his contract with his vendee and to make another with his nominee (the transferree).

The true view of the contract, as affected by the usages, it is submitted, is, that the contract was a substantial contract between Grissell and Bristowe as *principals*, and that the conveyance of the shares was merely *collateral* to the contract. In Wilkinson *v.* Lloyd, 7 Queen's Bench, 27, where a transfer had been executed and the shares paid for,

and the directors refused to allow the transfer to be completed pending an action which they had commenced against the *transferror*, Wilkinson, the transferree, brought his action against Lloyd, the transferror and vendor, for the purchase-money, as for money had and received to his use by Lloyd, and it was objected that there was no complete failure of consideration, as the transfers had not been returned to the defendant, and still existed. Mr. Justice Patteson, in delivering the considered judgment of the Court, says, as to this point upon the last objection :—" We entertained considerable doubt, as inconvenience and difficulty may be occasioned to the defendant if the transfers executed by him are not returned or cancelled. But we think that the return or cancelling of the transfers is not a condition precedent to the plaintiff's right to recover the purchase-money upon failure by the defendant to give possession or the right to the possession of the thing sold—the instruments of transfer are *collateral* to the contract and the subject-matter of the sale; and though the defendant may be entitled to require their re-delivery to him, we think the non-completion of the transfers such a failure of consideration as entitles the plaintiff to recover in this action, though the instruments executed by the defendant have not been returned."

It seems almost unnecessary to deal with another *fallacy* in the judgment of the Exchequer Chamber, as if it be conclusively shewn that there never was

or could be any transfer, according to the usages, of Grissell's contract at *one* price to Bristowe's nominee at *another* price, any questions whether the seller is satisfied with the buyer, or whether he has any opportunity, by reasonable or any diligence, of protecting himself against loss, do not seem to arise in practice—in fact, they do not and cannot arise, as, if the last person to whom the name ticket is delivered is to be bound by the acceptance of the name given in the ticket, so must every person through whose hands it may have passed (and a ticket may pass through ten, twenty, or more hands in the space of an hour or two), and how could it reasonably be said that every person taking the ticket was bound by the name mentioned therein?

The supposed difficulty as to the execution of the transfer will be further dealt with in considering the case in Chancery.

As to the concluding statement of the Court, that in their opinion "the contract, as interpreted by the usage, was that the defendants, the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with *all its incidents*." This, it is submitted, clearly was not so, for the reason mentioned—namely, that the contract of the transferror was made by his broker at one price, and the contract made by the transferree with his vendor or jobber was made at another price.

No payment of the price by the transferree's broker would bind the transferree to accept from the transferror a contract different to the one the transferree really made, and if the transferror were to allege that he sold the shares to the transferree at the price named in the transfer, the transferror must necessarily fail in proving such an allegation, as no such sale ever took place.

In Hawkins *v.* Maltby, 37 Law Journal, Chancery, 58, Lord Chelmsford confirmed the dismissal of the bill of Hawkins, with costs, expressly on the ground that he had alleged his sale at one, viz., the price at which he had sold, and yet claimed a specific performance against Maltby on a transfer at another price, such price being the price at which Maltby had bought, and which, according to the practice, was the price mentioned in the transfer. When the facts of the Stock Exchange practice are fully understood, his Lordship's observations practically dispose of the question whether there is any bargain between the transferror and the transferree—not being the vendee of the transferror. His Lordship says:—"By this bill the plaintiffs seek a specific performance of an agreement for a transfer of these forty shares, in consideration of the purchase-moneys of £202 10*s.*, which were sent to the brokers to be handed by the defendant's brokers to Messrs. Wilkin, for the defendant, and the plaintiffs, by their bill, pray that the defendant may be decreed specifically to perform the agreement so entered into by him, as aforesaid, for the purchase of

forty shares in the said Imperial Mercantile Credit Company (Limited). Now, is there any proof of any such contract having been entered into? The only proof that is given is of this transfer, which is, 'in consideration of £145 paid to me by Mr. James John Maltby, I hereby bargain, sell, assign, and transfer to the said J. J. Maltby, the forty shares numbered,' &c. If I were to make a decree for the specific performance of this contract which is alleged in the bill, I should compel the performance of a contract into which the parties never entered. The proof, therefore, of the contract, in the plaintiffs' bill, entirely fails; and it is quite impossible, therefore, that they can be entitled to the relief which they pray by this particular bill. Whether on a bill properly framed, stating the real nature of the transaction, the plaintiffs would be entitled to recover is a different thing; but under these circumstances I feel myself compelled to say that the plaintiffs have failed in proof of the contract of which they seek the specific performance, and therefore I must affirm the decree and dismiss the appeal."

It is true that in this case Lord Chelmsford lets fall some observations to the effect, that if the contract had been differently stated, the plaintiffs might have made out a case; but surely, if the defendant did *not* buy at the price of £202 10*s.* (the price at which the plaintiffs sold), and therefore the plaintiffs failed in their suit, they ought equally to have failed if they had alleged that *they had sold* and the defendant

bought at the price named in the transfer (£145) as the purchase-money, as it is clear the plaintiffs did not *sell* at that price.

The Court of Exchequer Chamber seemed to think, that, by preparing the transfers and executing them, the plaintiff had accepted the transferrees as buyers, in the place of the jobber; but as this, together with the acceptance of and payment for the shares and certificates by the transferrees' brokers, was the ground of the decision of the case of Coles *v.* Bristowe, in Chancery, that case may be now considered.

In Coles *v.* Bristowe, the late Lord Chancellor, Lord Cairns, says:—"It may be well to repeat, in order to prevent misapprehension, that, in our opinion, the liability of the defendants continued entire and unbroken until there was an acceptance by the plaintiffs by the preparation and execution of the transfers of the names sent in by the *defendants as purchasers*, and until there was an acceptance of the shares by the purchasers, through the delivery to their brokers of, and payment by their brokers for, the transfers and certificates of the shares."

Now, is there not here the same fallacy which is above exposed in the case at law—the acceptance of the substituted names as *purchasers*? A purchaser can only be a purchaser *at a price*; and yet the substituted purchaser is a purchaser at *one* price, and his acceptance by a vendor who sold at another price is to be taken as making a contract between them, and, if so, at what price? Not at the vendor's price, certainly;

that is not mentioned in the transfer. And how can it be at the vendee's price, as the price mentioned in the transfer was much lower than the price actually received by the vendor, the difference between the transferee's price and the transferror's price being paid to him by his, the transferror's, vendee?

The *fallacy*, running through both the cases, as to there having been any acceptance of the transferree so as to discharge the transferror's vendee, is made still plainer by reading the 79th Rule of the Stock Exchange, which provides that "a member, having sold stock or other securities, and transferred or delivered the same, according to the *ticket or directions* given him by the buyer, has a right to demand payment of such buyer; and in case the seller apply to the member whose name is on the ticket, and is either refused payment or receives a cheque which is dishonoured, the buyer shall make immediate payment." This, coupled with the Rule (89) above mentioned, clearly shows the true view, according to the usages of the Exchange, viz., that the ticket is a mere *direction* by the buyer as to how the property is to pass, and that the transferror is bound to prepare his transfer at the price and to the name directed, and that neither the name nor the price is submitted to him for adoption or rejection; each contract is an *absolute* independent contract between each vendor and vendee, and the mode of fulfilment is only *collateral* to the contract; to interpret the contract, as meaning that the jobber might either accept the shares himself or give a name

or names of a transferree or transferrees, to whom no reasonable objection can be made, would seem simply to make a *new* contract for the parties by inserting a material condition to which they have not agreed.

The power of exception to the proposed transferree is considered an essential term of the contract by the Court of Appeal in Chancery, and though not considered essential by the Court of Appeal at Law, it is yet adverted to in terms importing that it practically existed and was reasonable. It is, however, submitted that it is unknown, in fact, to the practice of the Exchange, and is unreasonable in itself. It is clearly unknown to the practice of the Stock Exchange, because there is no *provision* in their rules for any such exception, and the seller is bound absolutely to transfer at the price and to the name given him by the buyer, under the Rules 79 and 89 above mentioned.

It is unreasonable, because the practice does not allow the time necessary for the due execution of any such power by sending to or communicating with persons, it may be, hundreds or thousands of miles distant, in order to make the necessary inquiries as to the solvency or competency of the proposed transferree. It may be, as has happened, that he is an infant, and how is the transferror to ascertain this? Is he to search for the certificate of his baptism or other evidence to show the age of the proposed transferree? and if so, who is to pay him for doing it, and how is he to consider this in fixing the price for his

shares? *Every person taking the ticket on the name day has as much right to be satisfied with the name given as the ultimate person who receives it, if there is any power of exception to the name,* and it is manifest that the practice allows no reasonable time to such persons for considering whether they ought to be satisfied with the name given.

The power of exception is unreasonable, because *almost every name ticket would be open to a reasonable objection on the face of it,* as every vendor might reasonably say, I know nothing of your proposed transferree, and I refuse to deal with him on that account; I have no time or means to spend in ascertaining his respectability or responsibility, or whether he is competent to accept the shares; he or she may be an infant or a married woman, for aught I know, and I decline to accept him or her.

It is also unreasonable because no seller on the Stock Exchange would deal with any other than a known buyer as a *principal,* and if he is to take his buyer as *the agent of an unknown principal, as to whose solvency he may have to take exception,* the fundamental Rule of the Stock Exchange, that every member deals as a principal, is altogether set aside and rendered inoperative.

But then it may be asked, what can be said as to the execution of the transfers? How can the transferror give his vendees, the Bristowes, the shares and certificates, if he has executed the transfers and passed the certificates to another person? To this question

it may be answered, first, that this has all been done at Bristowe's request and by Bristowe's directions, and it is just the same as if the shares had been transferred and the certificates delivered to Bristowes themselves. What is the difference? Bristowes have bought the shares at a price, and are bound to take them and pay for them, and they say in effect we will pay you part of the price by our cheque or in account, and the remainder by a ticket on a sub-purchaser under us, to whom we direct you to transfer the shares and hand over the certificates. How does it lie in the mouths of the Bristowes to say that they have not got the certificates and the transfers, when they have been delivered to their order; and, secondly, that if there was any difficulty in the plaintiffs' way, by reason of the execution of the transfer at the very highest, it was only one of *procedure,* and did not touch their ultimate right of indemnity against their vendees, the jobbers. Assume for a moment that the transferrors, by the effect of the ticket, were bound to look, *in the first instance,* to the transferrees for payment of the sum of money mentioned in the ticket and transfer, and for the ulterior consequence of indemnity, how or why should this release the transferror's vendee? It clearly would not as to the money if not paid, and why, therefore, should it release the jobbers as to the indemnity if the transferrees refuse to complete, and will not indemnify the vendors? At the very highest the point ought not to be put higher than this: Your suit is defective, as you have undertaken in the

first instance to look to the transferrees, and you should have made them defendants, and have prayed that they should indemnify you and pay the costs, and failing their indemnity, then you should have asked relief against your vendees. This would work out complete justice between all parties, and in many, if not in most cases, the transferrees could and would pay, and thus no injustice be done.

The true construction of Stock Exchange contracts by members would seem to be this—the contracts are binding on the parties as principals, and are to the effect that, from the time of the bargain, the quantity of shares or stock dealt in are at the risk of the purchaser, provided there is no default on the part of the vendor, and that such bargains may be directed by the buyer to be fulfilled by the seller by transfers at any market price (within three accounts) to any transferee the buyer may name, and that the seller may, if so directed, go to such transferee or his agent for the transferee's purchase-money, and take the transfer and certificates to him, and if the same are so taken, and are good shares and certificates, and there is no valid objection by the company against the transferror, and if the transferror's purchase-money is settled in account with his buyer, there is a fulfilment of the seller's obligations to the vendee, but this does not relieve the vendee from his obligations to the vendor for any default on the part of his (the vendee's) nominee or transferree, as, *if his cheque is not paid*, the original buyer must make *immediate payment.*

That the proposition decided in Chancery, that when the transfers and certificates are accepted and paid for by the transferree the *jobber is discharged* from all liability, cannot be sustained, is, perhaps, sufficiently obvious by considering that, although the transferree may accept and pay the contract money and execute the transfer, and become, as supposed by the Courts, a substituted contractor with the transferror, he may, notwithstanding, not get his shares, as the company may *refuse*—as in Wilkinson *v.* Lloyd—to register the transfer, on account of some claim against the *transferror*. What, in such case, is the transferree to do? He cannot get his shares; is his only remedy on his supposed contract with his supposed vendor the transferror?—or could he not say, as in the case above mentioned, to his real vendor, "You bargained to give me shares which I could get transferred. These cannot be transferred owing to the default of the transferror you introduced to me. You must return my money, or find me other shares?" The default here suggested was caused by the default of the nominee of the seller with whom the transferrees dealt; and this seller was held liable to return his purchase-money, and consequently liable for the acts of his nominee. And this is consistent with the 84th Rule of the Stock Exchange, which provides "That the seller of registered stock or shares is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received, until reasonable time has been allowed to the buyer

to execute and duly lodge such documents for verification and registration." A seller, therefore, delivering stock or shares to his buyer through the hands of another person is responsible to his buyer for defaults of the transferror; and why should not the converse be true, viz., that the buyer is responsible to his vendor for defaults of his vendee?

Every contract on the Stock Exchange is made by the members as *principals*, and surely this must mean that each undertakes personally that the entire contract shall be carried out, so far as they are respectively concerned—the seller contracting for good shares, and to find a transferror capable and willing, and allowed by the company, to transfer and to hold any subsequent advantage arising in respect of the shares for the benefit of the buyer, and the buyer contracting to pay (or receive his purchase-money, as the case may be), and take the transfer either to himself or to his nominee, and that he or his nominee shall and will do all things necessary to take the shares, and also to indemnify the vendor from all subsequent liabilities on the shares.

The sale must mean this, or it is not a complete sale at all. There is no magic in shares, and supposing instead of shares it was the case of a sale of a lease subject to a rent, each buyer would have to indemnify his vendor, and the mere fact that the ultimate transfer had, perhaps to save trouble, inaccurately described the relations of the parties and the contracts between them, ought not, *in Equity*, to

interfere with the carrying out of the contracts made according to the facts.

It is true that if the rule as to making the contracts as principals were fully carried out in practice, the effect would be to make the purchasing broker, whose principal refuses to perform his bargain, responsible on the Stock Exchange for his default; but this is consistent with Stock Exchange usage, and also with good sense, as throwing the burthen caused by the defaulter on the member of the Stock Exchange who introduced the defaulter to the contract. The jobber would be just as safe as he is now, but the responsibility would be thrown upon the broker, who could sue his principal for any payments made on account of such liability as money paid to his use.

That the broker, according to the usage of the Exchange, is responsible for his clients is clear, as he does business as a principal for them. Rule 49 of the Stock Exchange Committee is as follows:—"The Stock Exchange does not recognise in its dealings any other parties than its own members. Every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the regulations and usages of the House; and should a principal, without the consent of the Committee, attempt to enforce by law a claim against a member of the Stock Exchange, the Committee will decide as to the liability of the broker or agent of such principal for any *cost* or *damages* incurred in consequence of legal proceedings."

To show how the Committee of the Stock Exchange carry out this Rule, I may mention that after Mr. Stray —in the case of Stray *v.* Russell—had failed to recover from a jobber the moneys his brokers had paid against his direction, but, according to the usages and to their contract made for him for some Royal British Bank shares purchased before the failure of the bank, Russell demanded of Stray's brokers certain extra costs, *as between attorney and client*, to which he had been put through Stray's action, as responsible for his acts, and the Committee ordered these costs to be paid by Stray's brokers.

It is submitted that it is much more consistent with good sense to make the broker responsible for his own client whom he introduces to the Exchange, rather than to put upon him the responsibility of exercising "reasonable diligence," in order to ascertain whether the name tendered by the jobber is the name of a person with whom his client ought to be satisfied.

The Court of Exchequer Chamber said that, "If a buyer is found as to whom the seller's broker is satisfied the seller has all that he sought for. In practice no seller employing a broker to sell stock or shares for him thinks of limiting the authority of the broker to selling exclusively to a jobber. He is satisfied with the buyer whom the broker finds for him, and for the obvious *reason that he has it in his power, by reasonable diligence by himself or his broker, to protect himself against loss.*"

It is, however, submitted that *this is not so, and*

that no broker ever does or would undertake the responsibility of ascertaining whether the name given to him represents a person with whom he ought to be satisfied as a person competent to protect his client against loss. The broker deals with the jobber and with him only.

The only ground upon which the decisions in error could be supported is to say that, according to the usage, whoever, on the balancing of the account, turn out to be the real transferrees of the shares to be transferred on the settlement of the account, shall be accepted by the vendors who turn out to be the transferrors as satisfactory transferrees, and as discharging the transferror's vendee without any reference to the consideration whether the names thus given are, in the absence of fraud, reasonably free from objections; but this ground, which is the only possible ground upon which, as I conceive, according to the usages, the decisions under consideration can be supported, is expressly rejected by one Court of Appeal, consisting of the Lord Chancellor and the Lords Justices, whilst the other Court of Appeal, viz., the Exchequer Chamber, expresses itself as prepared, if necessary, to adopt it. Both courts cannot be right, as they are expressly *opposed* in their views.

The Court of Chancery says: "The question, however, remains—what is the exact contract or liability of the jobber? It was at one part of the argument of the counsel for the appellants contended that the dealings of a jobber in shares for any particular

settling day being very large, it was not to be supposed that the jobber intended, for the small remuneration he received, to assume the liabilities, it might be, of many hundred thousand pounds; and it was suggested that the only undertaking he came under to the seller was, that at the settling day he would pay the price and give a name for the shares, and that thereupon, whether the name was objectionable or unobjectionable, whether the person did or did not accept the shares, the jobber was released from liability. This argument, in our opinion, puts the case of the jobber much too high—such a contract would be highly unreasonable, if not illusory. It would or might practically absolve the jobber from any liability whatever beyond the payment of the purchase-money, and, in ordinary cases, the mere payment of the purchase-money, without substitution of liability upon the shares, would effect only a part, and, in cases like the present, the least important part, of the object of the vendor."

The Court of Exchequer Chamber says:—"According to the usages as stated in the case, the defendants were only bound to find a party, or parties, able and willing to stand in their place and discharge the obligations of the contract, or in the alternative, to fulfil the contract themselves. But the first of these alternatives the defendants have in fact performed. They have found parties able to perform the contract, and who, by accepting the transfers, have assented to stand in the position of buyers, and have bound

themselves to the performance of all the remaining obligations of the contract. While, therefore, we agree that the defendants would not have satisfied the exigency of the contract as qualified by the usage by merely giving in the names of parties able to carry out the contract, unless those parties had placed themselves under the same obligations as they themselves were under, yet, as soon as they produce persons who paid the price and accepted the transfers, and thereby took upon themselves the ulterior liabilities of the contract, they had done all which, according to the contract, they undertook to do. If, then, the case had rested here, and all that appeared had been that the defendants had tendered parties able and willing to pay for and accept the shares, *we should have been prepared to hold that the defendants had satisfied the contract they had entered into and were exonerated from further liability.*"

It is submitted that Walker *v.* Bartlett, 25 Law Journal, Ch. 263, ought to be conclusive as to the liability of the defendants. In that case there was a sale of mining shares with a blank transfer, and it was held that the defendant was not bound to register the transfer in his own name as owner, since the leaving the name of the transferree in blank shewed that it was the intention of the parties that the defendant might have the power of transferring his right in the shares to any other person. But it was held also that there was an implied contract by the defendant to indemnify the plaintiff against the con-

sequences of suffering the plaintiff's name to remain on the register after the plaintiff had done all in his power to convey a perfect title in the shares to the defendant. The contract in this case was substantially the same as in the Stock Exchange cases, viz., the contract enabled the defendant to get the shares registered in his own name, or in that of some other person to whom he might sell them, and the only difference is, that as a blank transfer could not lawfully be executed, the name on the Stock Exchange is filled in by the brokers at the request and by the direction and for the convenience of the buyer, such course of dealing being the established usage for the more conveniently carrying out of the contracts between the members of the Exchange, and it never was intended by anybody that any contract of sale should be made by each transferror with his transferree. In Walker *v.* Bartlett, if the name of the transferree had been inserted in the blank transfer by Bartlett, it would have been done by Walker's authority, as the blank transfer was given to Bartlett for that purpose; and supposing this to have been done by *one agent* authorised for that purpose, what difference does it make that it was done by another agent duly authorised? viz., the broker of the transferror. And the case surely cannot turn upon the question whether such name was ever brought to the knowledge of the transferror. It clearly was not ever brought to his knowledge for the purpose of making any new contract, but merely for the purpose of the transfer of the shares to the transferree as the jobber's nominee. And again, if the name is inserted in the transfer by the authorised agent of the transferror, he is as much bound by it as if inserted by himself. To hold that the transfer, to whomsoever made, releases the intermediate bargains, is in effect to divide each contract into two parts—one as to the payment or receipt of the purchase-money on the account day of the different prices by each buyer and seller, and the other as to the devolution of the shares and the consequences of such devolution. It comes to this — that the shares may come from anybody and go with the liabilities to anybody — in other words, the contracts are made with known persons as to the moneys to be paid or received on each account day, and as to the devolution of the rights or liabilities under the shares with persons *unknown* at the date of the contract, but to be afterwards developed by the balancing of each account at the Stock Exchange; or in other words, it is to make a bargain which *unquestionably* is a real bargain between each buyer and seller as to all the risks and benefits of the shares into a bargain between them only as to the purchase-money to be paid on the account day, but no real bargain at all between them as to the risks of the shares if the nominee suffers them to remain in the name of the seller—in other words, it is to treat the usage which is established as a convenient mode for the payment or delivery of the shares as *nullifying* one of the material conditions, and in shares where money is paid

to get quit of the risk of holding them, the only material condition of the bargain. This is so contrary to sound reasoning, that, to say the least, the cases require serious re-consideration.

Perhaps the true explanation of the difficulty is that the Stock Exchange Rules were only framed for the convenient settlement of each account, and were never intended to affect ulterior liabilities.

The fact that special bargains are made at a special price for registration, whether in a particular name or not, does not really affect the general question as to the bargains actually made according to the usages as general bargains; and it may be right to hold, as was held in Walker *v.* Bartlett, in the Exchequer Chamber, that there is no agreement for registration, and yet that there is an agreement to indemnify against the consequences of suffering the shares to remain registered in the name of the vendor.

There are one or two other cases which it is necessary to notice.

The case of Sheppard *v.* Murphy, in Ireland, 16 Weekly Reporter, 948, on Appeal, reversing, as I think, the correct judgment of Vice-Chancellor Chatterton on this point, may be disposed of by the observation that it proceeds upon the same fallacy above adverted to as to the transfer of the contract made at one price to a vendee who made his contract at another price.

And then there is the case of Shaw *v.* Fisher, 5 De Gex, M. & G., 596, adverted to in the judgment of

the Court of Appeal in Chancery, as supporting their judgment; and this case may be said to have turned upon the particular facts of the case, and if the facts had been as they are in Stock Exchange cases, Lord Cranworth's judgment is really in favour of the view taken in these observations. In Shaw *v.* Fisher, Fisher was the purchaser at an auction, and Carmichael a sub-vendee at another auction from Fisher, and a conveyance had been executed by Shaw to Carmichael, the sub-vendee: there were other facts which it is unnecessary to advert to here. Lord Cranworth is reported to have said, "It struck me at one time as possible that there might be no defence, because, if the assignment to Mr. Carmichael had not been an assignment by way of transfer to him, but merely an assignment at the instance of the purchaser, who might have said, 'I wish you to convey these shares to Mr. Carmichael for me, in pursuance, as it were, of some arrangement between me and Mr. Carmichael,' then there might have been no bar to any relief against Mr. Fisher, because what the plaintiff had been doing would have been, as it were, in the capacity of an agent of the person from whom Mr. Carmichael purchased." His Lordship concludes by saying, that that was not the history of the transaction in Shaw *v.* Fisher.

It is, however, respectfully submitted that it is the history of every transaction completed according to the usages of the Stock Exchange. The transferror, in conveying to the nominee of his vendee, does not convey in pursuance of any contract, express or im-

plied, made by such transferror with such nominee, but in pursuance of his, the transferror's, own contract with his vendee; and in making the conveyance he really acts, as it were, as the agent of his vendee; when payment is made to him by his vendee, he becomes, in fact, a trustee for his vendee, and is bound to convey the shares to whomsoever his vendee shall direct him to convey them.

And this brings me to notice a case which seems to have been decided upon this principle, viz., the case of Paine *v.* Hutchinson, 37 Law Journal, Chancery, 485, decided on Appeal by the Lords-Justices Wood and Selwyn, affirming the judgment of Vice-Chancellor Stuart.

The plaintiffs, who were *jobbers* on the Stock Exchange, having contracted to buy certain shares in a company, which were standing in Cruse's name, agreed to sell the same to the defendant's brokers, who then did not disclose their principal's name. On the name day, the defendant's name was given by his brokers to the plaintiffs. The transfer was prepared by Cruse's broker to the defendant, and, duly executed by Cruse, was handed, with the certificates, by his brokers, according to the practice, to the defendant's brokers, who paid his purchase-money to Cruse's broker. The defendant refused to execute the transfer, and the plaintiffs filed a bill for specific performance of their contract with the defendant's brokers; but before the cause came to a hearing, the company was ordered to be wound up under the

supervision of the Court. It was held, affirming the decision of Vice-Chancellor Stuart, that the plaintiffs were entitled to a decree for specific performance, a variation, however, being made in the decree by a direction to the defendants *to indemnify the plaintiffs, the jobbers, against any calls.*

Everything occurred in Paine *v.* Hutchinson which in Cole *v.* Bristowe was held would *discharge* the jobbers, and yet they were held not to have been discharged from their contract with their sub-vendee, but entitled to a specific performance thereof, together with indemnity for subsequent calls.

The then Lord-Justice Wood, now Lord Hatherley, says:—"When the bill was filed, there was as clear a case for specific performance as one can well conceive. There were the shares bought; they stood originally in Cruse's name, but from the moment they were bought, on the 18th of November, they became the property in equity of the plaintiffs, and Cruse was a mere trustee for them. There was nothing to prevent their selling that which was held in trust for them, just as much as if it had been vested in themselves upon the completion of a legal transfer. Having sold the property to Hutchinson, they take every step necessary on their part. I am clearly of opinion that Hutchinson authorised Railton to buy.—[His Lordship examined the evidence as to the authority of Railton and the London broker to buy, arriving at the conclusion that the authority was clearly established.]—The defendant, therefore, purchased the shares, and

they are his. He had, however, it appears, some other dealings or transactions with which Railton had nothing to do, nor had the plaintiffs, in which he wished to dispose of the shares to some other person. He had sent to him the actual transfers made out in his name, as early as the 17th and 18th of November; and we find him on the 21st of December, more than a month afterwards, raising no question at all of their having been in that form, except its being convenient for saving a stamp, and for some other arrangements, that his own name should not appear. That being so, and the contract being perfectly complete when the bill was filed, of course the plaintiffs were entitled to their decree for an acceptance by the defendant of the shares, they, the plaintiffs, on their part being bound to transfer them. The shares stood in the names of trustees for the plaintiffs, who sold with the legal estate outstanding, and it was their business to get in that legal estate—that is, to obtain a transfer to the defendant, and the defendant on his part was bound to accept the transfer."

It seems impossible that Paine *v.* Hutchinson can stand consistently with *Coles* v. *Bristowe*. The transferee can only be liable to *one suit for specific performance and indemnity*. If he has accepted Cruse, and Cruse has accepted him, according to Coles *v.* Bristowe the *jobbers would be discharged*, and it is submitted that the transferree cannot be held liable to both the transferror, not his vendors, and also to the jobbers, his real vendors.

And, lastly, there is the case of Cruse *v.* Paine, 37 Law Journal, Chancery, 711, where the jobbers were held liable on their contract to indemnify their vendor, notwithstanding that such vendor had transferred the shares and certificates to Hutchinson by the direction of the jobbers. Vice-Chancellor Giffard, now Lord-Justice, held that there was no foundation for the contention that Cruse had made a new contract with Hutchinson, the transferree.

It is respectfully submitted, in conclusion of the cases in the Courts of Appeal, that the true view of Stock Exchange Contracts is that suggested by Lord Cranworth in the above-mentioned case of Shaw *v.* Fisher, and afterwards taken by the present Lord Chancellor, Lord Hatherley, when Lord-Justice, and Lord-Justice Selwyn, in the above-mentioned case of Paine *v.* Hutchinson, viz., that on payment of the purchase-money by the buyer or his agent, the seller becomes a trustee for his buyer, and is bound to convey as he may direct, and in so doing he in nowise releases his buyer from his liability to indemnify his seller for calls so long as the shares are suffered by the buyer's nominee or vendee to remain in the seller's name.

If this view is correct, it follows that the Stock Exchange usage, that the seller shall transfer according to the directions of the buyer, is nothing more than equity would require him to do, and that the only erroneous point in the Stock Exchange usage is the *false statement* made in the transfer that the

consideration therein mentioned has been paid by the transferree to the transferror, instead of the *true statement* that the transferror had sold to a jobber, and that by the jobber's directions he transfers the shares to the last sub-purchaser at the price at which he had purchased the same.

It also follows that the cases of Grissell *v.* Bristowe, and Coles *v.* Bristowe, as decided on Appeal, cannot be supported.

So long, however, as they remain unreversed and *unquestioned by the Stock Exchange Committee*, every prudent seller of shares, involving possible future calls, should avoid the Stock Exchange Market, unless his broker will specially undertake to find him a satisfactory transferree, both responsible and able to contract, lest haply—it may be long afterwards—he should find himself a contributory in Chancery for heavy calls, and his alleged sale on the Stock Exchange Market only "a mockery, a delusion, and a snare."

JAMES J. ASTON.

4, Middle Temple Lane
January, 1869.

APPENDIX.

The following Article appeared in the *Economist* of 12th December, 1868:—

THE STOCK EXCHANGE USAGE AS TO DEALING IN THE SHARES OF LIMITED LIABILITY COMPANIES.

The decisions of the Exchequer Chamber, and of the Lord Chancellor in the cases of Grissell *v.* Bristowe and Coles *v.* Bristowe have given great satisfaction on the Stock Exchange. This is not to be wondered at. An interpretation has been placed on the usage in dealings there which makes it very safe for jobbers to handle a class of shares that might otherwise, if recklessly dealt in, have brought upon them very serious responsibilities. If the judgments are not reversed on appeal they may henceforth deal almost as freely in the shares of insolvent companies or companies approaching insolvency as in shares involving no danger of liability. We are not sure, however, that what is convenient and satisfactory on the Stock Exchange will be equally so to the public. The question is—Who is to indemnify a seller of shares in an insolvent company when his sale, through no fault of his, is not completed by the registration of the transfer? The Courts have decided that the person to indemnify him is *not* the jobber with whom he dealt immediately through his broker, and they indicate the ultimate vendee according to the Stock Exchange rule as the person who is liable. Is the rule thus established as convenient for the seller as it is for the broker and jobber, and does it really meet the equity of the case?

The rule, it should be observed, is entirely *new*. The decision virtually is that when a jobber buys shares he does not really buy them—he only does so conditionally on his not finding a person willing to become an actual purchaser. To put it another way—the seller employs him to dispose of the shares, and a minimum price is agreed upon, the jobber's commission being what he can make out of them beyond that price, for which in return he comes under the obligation to take the shares himself if he cannot find another purchaser. He is, in fact, a kind of broker, receiving a varying commission, and undertaking greater responsibility to those who employ him than the ordinary professional broker. Now in the majority of Stock Exchange transactions this would not matter. It would be of no consequence to a seller to whom he might be called on to assign the shares, so long as he got the money. It might be to the jobber; it might be to the nominee; in either case the liability of the jobber to pay the price was a certainty, and as the shares were not parted with till the price was paid the seller had every security. It is only when the shares carry with them a liability, when the important thing for the seller is not the price but the liability he gets another to relieve him from, that the point becomes of any consequence; and even then it is only when companies are becoming insolvent and their insolvency prevents the registration of the transfer that the peril arises. The seller must then know to whom his sale is made. But this is to say that the peculiar meaning given to the contract with the jobber could not have been thought of until two years ago. The companies with shares carrying liability could not exist in any numbers until 1862, and it was not till 1866, that the liability in fact became a serious matter. Until then the result was the same whether the contract with the jobber was an out-and-out sale or not,—whether he was a real buyer or a contingent one, or a *quasi*-agent, or whatever the decisions just given determine him to be. Now it is different, and the interpretation of the jobber's contract in the way stated carries with it important consequences. But note the peculiarity. The usage existed before this particular class of dealings came into existence, and now it is interpreted to decide a point which cannot have been included among the considerations of convenience which gave rise to it. No one had thought of the matter until a seller found

himself required to pay calls, and was forced to consider who should indemnify him. There is thus very little to be considered but the equity of the matter—what the parties ought to have meant when they applied an old usage, without much thought perhaps, to a new class of transactions.

In laying down the above rule—making the sale to a jobber only contingent—the judges seem to have had in view two considerations as determining its reasonableness and equity. 1. That a jobber, perhaps having a multitude of transactions, could not be supposed to subject himself to all the responsibilities thus incurred, if he was not to be wholly relieved by finding another purchaser; and 2. That sellers found their advantage in the rule, as nothing else would make it safe for jobbers to interfere at all, and the intervention of jobbers secured a better market. They thus allege that the convenience of the seller *is* consulted sufficiently. But we can hardly accept the statements without qualification, while several matters appear to have been overlooked.

Our objection is that the jobber is made so safe that the market in such shares may be closed altogether. The sale to a jobber, as the seller looks at it, becomes rather a dubious sort of transaction. It is a sale which may or may not be a real one, according to circumstances. If he could always look to the first purchaser, he would understand what was done; but by this rule there is ample provision for doubts. By accepting the nominee, or nominee of the nominee, the seller is to relieve the jobber; but disputes must arise as to what acceptance is, or when it should take place. A contradiction between the two judgments is here very instructive. The Lord Chief Justice in the Exchequer Chamber says that the usage must be "understood as claiming for the jobber a right to transfer the contract and claim exemption from liability in respect of it, only on his giving the name of a buyer *to whom the seller has no reasonable ground to object*." The Lord Chancellor, on the contrary, appears to contemplate the possession by the seller of an absolute veto on the jobber's nominees. He says:—"In our opinion the liability of the defendants [the jobbers] continued entire and unbroken until there was an acceptance by the plaintiff, by the preparation and execution of the transfers, of the names sent in

by the defendants as purchasers, and until there was an acceptance of the shares by the purchasers through the delivery to their brokers of, and payment by their brokers for, the transfers and certificates of the shares." We believe there is only confusion here, and that the Lord Chancellor meant to agree throughout with the Lord Chief Justice; but the result is a serious doubt as to what right a seller would have to object to a purchaser. What is a seller to understand henceforth? Can he keep the jobber bound *until* he accepts some other purchaser? Or is the jobber relieved by naming a person whom the seller ought to accept? The Lord Chancellor appears to be for the first alternative, and the Lord Chief Justice for the second. Of course there would be no contradiction where, as in the cases decided, the ultimate vendee had been "accepted;" but the point is certain to arise in future when new transactions are engaged in. In any case, if the version of the Lord Chief Justice is accepted, doubt will be inevitable. What would be a reasonable objection to a purchaser? This is the sort of question a seller will have to consider, instead of making an out-and-out sale once for all to a jobber.

The danger of having to decide such questions is aggravated by the difficulty of the inquiry itself. If a seller goes into the market he may deal with a man known to him, or with a man whom his broker knows, but how is he to make inquiries about a complete stranger? The idea of the Court is that the seller's broker will make the inquiry, but practically, as the *Solicitor's Journal* has pointed out, this is not to be expected. The broker will take care to give notice to his client that he specially refuses to undertake the responsibility. The seller will thus have to inquire himself, and as a rule he will either have to accept anybody or run the risk of making an "unreasonable objection." In this way we think the decision, by making jobbers too safe, will in effect close the market to sellers. They will not care to make apparent sales which there is only a chance of making real; and thus the supposed convenience of the rule—that it gives them a readier market—disappears.

A statement of Chief Baron Kelly bearing on this point appears a little surprising. He seemed to have rather a prejudice against sellers—to fancy that it was rather the business of the Court to

give them difficulties in disposing of their shares, instead of permitting brokers and jobbers to share them. "Surely," he said, "there is nothing unreasonable or unjust in subjecting to whatever degree of trouble and risk may attend such a transaction the seller of shares, which are often worse than valueless, which he is glad to part with at an almost nominal price, or at a premium paid to the buyer for taking them, and which have become the symbols not of a title to profits and dividends, but of a liability to losses and calls." We confess it appears to us the most natural thing in the world that a man should wish to part with almost valueless shares, and that there is nothing reprehensible in it. It is no reason whatever for giving a certain meaning to the terms of the contracts he makes, and insisting that when he thinks he has made a sale to a responsible buyer he should take the risk and trouble of inquiring about a third party. The meaning of the contract may have been that he should make the inquiry, but the nature of the article he sells is no reason for throwing a duty on him which would not otherwise be obligatory.

Our conclusion then is that the interpretation of the usage is not reasonable or equitable—that the reasons assigned are insufficient, and that the convenience of the seller has been especially overlooked. We must add that by the adoption of the opposite rule we do not see that any great inconvenience would result. Suppose that the usage is not inconsistent with the notion of a complete contract of sale at each dealing, and that in executing a transfer to a buyer's nominee the seller is only fulfilling his original contract, that in fact he has nothing to do with the ultimate vendee at all—what then? What real inconvenience would be suffered? Of course all those who dealt would have to take care what they were doing. In a series of buyings and sellings—a chain of transactions—it would be necessary to remember that each link was complete in itself; that full responsibility was incurred by all the buyers, just as the successive indorsers of a bill are responsible. But there is nothing unusual or extraordinary in such an arrangement. Jobbers would doubtless be chary of meddling with such shares,—as we suppose they were in the present case to some extent, not being quite sure of the interpretation now given,—but we do not suppose, as the Courts have inferred, that the transactions would be prevented altogether. To whatever

extent they were engaged in they would be certain—everyone would know who was to be responsible. Holders of shares might have somewhat more difficulty in getting rid of them, but the sales would be real and not illusory, and this advantage would far more than compensate any loss of price compared with what might be obtained in a sham market.

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